JUDGE MARK DAVIDSON
11TH DISTRICT COURT
201 Caroline, 9th Floor
Houston, Texas 77002

July 18, 2007

Re: Cause No. 2004-3,964; In *re: Asbestos*
Cause No. 2006-51,043; *Pena v. Bondex, et al*
Cause No. 2004-21,092; *Shake v. Quigley, et al*
Cause No. 2006-71,957; *Parker v. Alva Laval*

Dear Counsel:

You will recall that on July 13th, this Court heard extensive arguments on Motions for Summary Judgment filed by various defendants. This letter constitutes the ruling of the court on those motions.

The above cases are the first motions for summary judgment brought after the release of the opinion of the Texas Supreme Court in the case of *Borg Warner v. Flores.*[1] By the explicit language of the opinion, it is an evolution of the law of causation in cases alleging injury in asbestos cases. Prior to the hearing, I sent out questions concerning the opinion, to which counsel on all sides gave full answers. Those answers helped me focus on the issues before me on the summary judgments, but left other (unasked) questions. The nine hours of argument on the summary judgments raised other questions. Because my rulings on these three cases could be of some guidance to all counsel on how I will rule on similar motions in the future, I will attempt to address many of the issues that were raised in the briefing and argument to serve as a guide in future hearings.

Does Borg Warner v. Flores apply to these cases?

Plaintiffs argue that in its adoption of Chapter 90 of the Civil Practice and Remedies Code, the Texas Legislature preempted the common law of causation applicable to this case. The Supreme Court noted in Footnote 1 that *Borg Warner* was a pre-Chapter 90 case, and its requirements did not apply to the case. While the provisions of Chapter 90 require a medical certification of causation of mesothelioma or other

[1] Cause No. 05-0189; Texas Supreme Court opinion released June 8, 2008. Because of the newness of the case, it is not yet published in the Southwest Reporter. All citations to pages in this letter are to the opinion as it was released by the Supreme Court.

asbestos-related cancer, I am unable to find any language in the statute that suggests that there was any intent to adopt a new standard in the substantive law of causation. Rather, the required language in pre-suit reports is merely a prerequisite to the initiation of a case in which causation, among other things, must be proven by evidence.

Plaintiffs' second argument is that the cases before this court, unlike the *Borg Warner* case, are claims alleging mesothelioma, as opposed to the claim of asbestosis made by Mr. Flores, and that the requirements of the case are therefore not applicable. They argue that the Supreme Court's parenthetical note that the dose of asbestos necessary to cause mesothelioma is less than that of asbestosis is a signal that its holding should be given limited precedential value in these cases.

I am unable to accept this argument for several reasons. First, in stating the standards for factual sufficiency the Supreme Court continually refers to "asbestos claims" and "asbestos-related diseases" and not asbestosis[2]. I have to assume that the Court knows the latter to be a subset of the former, and chose their words deliberately. Secondly, the Court appears to have disapproved of the holding of *Tate v. Celotex* and its progeny. *Tate* was a case of mesothelioma, and the Court could have, had it been limiting its holding to asbestosis claims, distinguished it accordingly. It did not do so, and its silence in this regard is instructive. As a policy matter, I cannot divine a reason the Court would have trial courts apply a different standard of causation in one asbestos-related disease and not another.

Does the different level of disease thresholds mandate different legal analysis of mesothelioma cases?

One distinction between the two kinds of cases rings true, and is consistent with the Supreme Court's parenthetical mention of the lower dosage of asbestos inhalation necessary to cause mesothelioma: the amount of asbestos that must be inhaled to cause disease. By all accounts a fairly significant amount must be inhaled in order to cause asbestosis.[3] Plaintiffs present numerous peer-reviewed journals to present a credible case that there is no minimum threshold level below which mesothelioma cannot result. Those studies get morphed by affidavit into a doctrine that there is "no level *above ambient air levels* which has not been shown to contribute to the development of mesothelioma."[4] Before I can allow causation to be proven by <u>any</u> exposure above background levels, the threshold must be established with a statement of other than "more." Otherwise, we are led back to the conundrum the Supreme Court mentions that "…if a single fiber could cause asbestos, everyone would be susceptible."[5] If everyone is equally susceptible, of course, no one would be liable.

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[2] Their references to asbestosis are almost entirely contained in the review of the facts, and not in the discussion of the law.

[3] See *Borg Warner*, pp 9-10.

[4] This is a quotation from the Pena and Parker briefs, among many, many other places. Italics were added.

[5] *Borg Warner*, p.13

Over the years, this has developed into the "one fiber" theory, a belief that since every exposure can lead to mesothelioma, that every exposure is a substantial cause of the disease. Thus, it followed, each and every provider of asbestos in any amount, however small, is a substantial contributor and hence a tortfeasor. In my view, this theory confuses the difference between a potential cause and a substantial cause, and encourages speculation on how little exposure, and how infrequently the exposure must take place, before causation can be said to have been proven. Since there is no scientific basis for a belief that ambient level plus one fiber is a substantial cause, and since the court expressly disapproved language that "some" asbestos fiber can be adequate evidence of whether the exposure is a substantial cause of disease, I think the Court intended to raise the level of proof above that set forth in the *Tate* and *Borg Warner* opinions of the Corpus Christi Court of Appeals. Hence, while the amount of dose to which a plaintiff was exposed will be less in mesothelioma cases than asbestos cases, the legal requirements set out by the court for proof of causation in asbestos related disease, will be the same.

The *Pena* and *Parker* plaintiffs argue that "the causation question is not framed in terms of threshold levels... (but rather)... whether the exposures, within reasonable medical probability, contributed in a significant way to the aggregate risk." (Plaintiff's Response, p.12) First, their argument is best taken up with the Supreme Court on rehearing of *Borg Warner v. Flores*. The Court referred to mesothelioma causation in terms of a dose, albeit in a parenthetical dicta. Secondly, Plaintiffs will need to address whether mesothelioma, within reasonable medical probability, can be caused by little more than background levels (as inferred by all of their experts) and, if so, how that comports with substantial factor causation.

What must be proven to establish causation in a mesothelioma case?

Section 431 of the Restatement of Torts requires that exposure be a substantial factor in causing the disease. It is clear from the opinion that inhalation of "some asbestos" is insufficient evidence to establish causation. (p. 9) Dr. Castleman's and Dr. Bukowski's testimony, when read together, were found to be inadequate. In discussing the evidentiary standard in *Lohrmann*[6], the Supreme Court said in *Borg Warner* that proving frequency, regularity and proximity is "necessary but not sufficient." I do not take this language as a holding that each of those elements must be proven, except as part of the evidence showing dose. Nor is it enough for the Plaintiff to prove that a company's asbestos containing product was at the workplace while the plaintiff was at the workplace. Hence, the standard of causation is succinctly set out in this language from the case:

> Defendant-specific evidence relating to the approximate dose to which the plaintiff was exposed, coupled with evidence that the dose was a substantial factor in causing the asbestos-related disease, will suffice.[7]

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[6] The case is *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986).
[7] *Borg Warner* at p.12.

What is adequate evidence of dose?

The opinion takes pains to recognize the difficulties inherent in proving dose, and holding that the dose may be approximate and need not be exact. Comparing the summary judgment records on the *Pena* case with the *Shake* case before this court is instructive as to both the difficulties and a method of meeting the burden.

In *Pena*, Plaintiffs allege that Mr. Pena was exposed to asbestos while working as an electrician in proximity to drywall installers who used asbestos-containing joint compound. Mr. Pena is now deceased, and his deposition was not taken prior to his death. Even if it had been, of course, it would have been taken, as his sons' depositions were taken, prior to the time that the *Borg Warner* opinion was announced.

The deceased's sons, who are the Plaintiffs herein, accompanied their father during spring breaks and other school holidays while he was doing his work. They gave testimony as to what they saw him do while working, and their best memories as to what products they saw were being used nearby. Looking at the testimony in a light most favorable to the Plaintiffs, the evidence is based on the observations of two children who only saw their father's work occasionally. They remembered use of three brands of joint compound, but were not asked how much of any of them were used or what percentage of the total joint compound used had been made by any specific defendant. There is no evidence of Mr. Pena's total career exposure, or any basis upon which approximate doses can be determined, even within the roughest estimate. This problem is, in all likelihood, inherent in any case in which the individual alleged to be the subject of an asbestos related disease is not deposed before his death.[8] Without any idea of dose, it is more speculative than probable that the product of any specific Defendant caused Mr. Pena's mesothelioma. That some manufacturer of joint compound almost certainly caused it is probable. In *Pena*, the Plaintiff fails to establish, except in the most speculative sense, which one.

The record in the *Shake* case is different. The Plaintiff is alive, and counsel was able to elicit testimony as to which brands of joint compound were used, and how much of which brand was used. Dr. Longo's affidavit, based on the Plaintiff's deposition and on studies of asbestos emissions from various activities, gives an approximation as to his exposure level that meets the *Havner* standard of "equal to or greater than" toxicity levels and meets the substantial causal factor test; this constitutes the kind of "Defendant-specific testimony" called for in the Supreme Court's opinion in *Borg Warner*.

What is a dose?

The Supreme Court's opinion suggests, but does not explicitly state, that a Plaintiff must show the "approximate dose to which the plaintiff was *exposed*" p.. 12 – italics added). This gives rise to the question of whether the Plaintiff must show

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[8] It is possible, of course, that one could subpoena coworkers or the records of the employers of the sheet rockers to determine what brands of various asbestos containing products were used and how much of those products were used on a consistent basis. That may not be possible in all cases, of course.

inhalation or exposure. Since I am aware of no one other than Dr. Josef Mengele who might have exposed human beings to measured amounts of asbestos for the purpose of determining how much they would inhale and cause illness, I am going to take the Court at its literal word of "exposure" rather than "inhalation." In so doing, I am also taking the liberty of taking judicial notice of the fact that human beings breathe. If I am wrong on this interpretation of the Supreme Court's opinion, I am certain this is something the Defendants can ask the court to clarify on rehearing, and, if so clarified, I will promptly dismiss all pending cases shortly thereafter.

I had raised the question before the hearing whether a dose must be a numerical figure. I cannot conclude that the Supreme Court will allow "real dusty" or "lots of asbestos" to be the sole evidence of dosage, and will require an approximate number. My reasoning is that if "some" asbestos is no evidence of dose, which the Court found, then neither are terms greater in volume but equally non-numerical. Again, if anyone thinks this is not in the spirit of *Borg Warner*, they are welcome to ask for clarification.

Do both the specific dose from a defendant and the total dose from all exposures have to be proven as a part of the substantial factor test?

Counsel for Owens-Illinois argued that part of a *prima facie* case is a showing of total lifetime exposures as well as specific exposures from the product of a defendant. This way, he argues, a jury can better determine whether or not an exposure is substantial. The Supreme Court did not mandate this requirement, and I was not cited to any precedent from any court anywhere in America that so requires. Again, this may be something he may care to ask the Supreme Court to address on rehearing. In future trials, a defendant may certainly attempt to show both as part of a defense that their product was not a substantial cause of injury or in support of a showing of the existence of responsible third parties named in their pleadings.

Need a Plaintiff show the asbestos fiber type and Havner-qualified epidemiology consistent with that fiber type as part of a causation?

If epidemiology is used to establish causation, it must be consistent with the Supreme Court's opinion in *Merrill Dow v. Havner*. Unless a defendant objects to use of epidemiology on the basis of lack of a comparable fiber type, that challenge to reliability is waived. *See Coastal Transp. Co. v. Crown Central Petroleum Corp.* 136 S.W.3d 227, 231-33 (Tex. 2004). No such challenge was made here, except briefly by one counsel for one defendant at oral argument. If it is a requirement, and if Plaintiff's epidemiology is deficient (which I do not find to be the case), it was waived in these cases.

What are your rulings, anyway?

The Motion for Summary Judgment in *Pena* is granted. The Motion for Summary Judgment in *Shake* is denied.

Parker is close. Very close. Mr. Parker is still alive, and counsel was able to elicit deposition testimony of which products he used and how often he used them. Experts for the Plaintiff then gave opinions of what quantum of asbestos fibers those activities would typically emit in airborne fibers. The affidavit was generic, and not specific to Mr. Parker. It cannot be denied that Mr. Parker did breathe significant amounts of fiber from Georgia Pacific products. In the specific case of Mr. Parker, I will rule that a fact issue exists as to causation, and deny the Motion for Summary Judgment. I am doing so in part because *Borg Warner* is a new case and its requirements are uncertain. I will decline at his time to dismiss a case solely because the expert affidavit was generic and not specific to the Plaintiff. If the evidence at the trial as to exposure is as generic as the Longo affidavit was on this record, the trial judge should give consideration to a directed verdict. Counsel should be advised that as the evidentiary standards in the post-*Borg Warner* world evolve, the strictness with which I review these motions may do so as well.

Counsel are invited to prepare orders consistent with these rulings.

Respectfully,

MARK DAVIDSON